

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 22-cv-22538-ALTMAN/REID

DOMINIK KARNAS, *et al.*, on behalf
of himself and others similarly situated,
Plaintiffs,

v.

MARK CUBAN, *et al.*,
Defendants.

**PLAINTIFFS' NOTICE OF FILING SUPPLEMENTAL AUTHORITY IN SUPPORT
OF [ECF NO. 195] PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'
OMNIBUS MOTION [ECF NO. 189] TO DISMISS THE SECOND AMENDED
COMPLAINT AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs submit, as supplemental authority in support of their Response in Opposition [ECF No. 195] to Defendants' Omnibus Motion to Dismiss the Second Amended Complaint [ECF No. 189], and in follow up on Plaintiffs' Notices of Filing Supplemental Authority filed in this action on March 14, 2024, [ECF No. 230], March 21, 2024 [ECF No. 242], March 27, 2024 [ECF No. 249], May 29, 2024 [ECF No. 299], August 16, 2024 [ECF No. 305] the recent orders by the Honorable William H. Orrick of the Northern District of California in *SEC v. Payward, Inc., et al.*, 23-cv-06003-WHO: denying defendant Kraken's motion to dismiss the SEC's complaint, ECF No. 90 (S.D. Fla. Aug. 23, 2024), attached as **Exhibit A** ("Motion to Dismiss Order").

In *SEC v. Payward, Inc.*, Judge Orrick found that the SEC plausibly alleged Kraken offered or sold crypto assets on Kraken as investment contracts, which were therefore plausibly alleged to be unregistered securities. Motion to Dismiss Order at 27. In doing so, the court rejected, as other courts have, Kraken's argument that an investment contract requires "post-sale obligations" from the issuer to the purchaser who bought the token on a secondary marketplace, like Kraken. *Id.* at 13. The court was clear that investment contracts are not limited to actual contracts and that the Howey test applies regardless of whether that transaction is on a primary or secondary market. *Id.* at 16-18. Additionally, Judge Orrick agreed with previous courts, including Judge Rakoff in *Terraform*, that there is a distinction between the digital assets themselves and the offers to sell them. *Id.* at 14.

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Further, the court found the SEC to have plausibly alleged vertical commonality, and thus common enterprise, because the promoters of some crypto assets on Kraken allegedly retain ownership or control over billions of the tokens they promote. Id. at 23

Dated: August 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing was filed on August 30, 2024, via the Court's CM/ECF system, which will send notification of such filing to all attorneys of record.

By: /s/ Adam M. Moskowitz

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